Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ROBERT BOGGI

Petitioner

vs.

UNITED STATES OF AMERICA

Respondent

Petition for Writ of Certiorari To the United States Court of Appeals for the Third Circuit

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PETITION FOR WRIT OF CERTIORARI

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April 18, 1996

QUESTIONS PRESENTED FOR REVIEW

I.

The concealment by the prosecution of a witness favorable to the defendant, and the failure of the trial court to enforce a subpoena issued by the defendant to the said witness.

II.

The failure of the prosecution to disclose the dates of the acts alleged, until the commencement of the trial, which was contrary to the discovery order of the trial court; and the failure of the prosecution to advise the defendant that major prosecution witnesses had significantly changed their prior testimony and statements.

III.

The determination that the trial court was required to find that the defendant obstructed or impeded the administration of justice, as a result of the jury not believing his testimony, and thereby requiring an enhancement of the sentence by two points.

QUESTIONS PRESENTED FOR REVIEW - Continued

IV.

The determination by the Third Circuit Court of Appeals that the trial court improperly applied Section 2C1.1 of the sentencing guidelines, and should have applied Section 2B3.2 or possibly 2B3.3.

PARTIES

All parties are identified in the Caption.

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TABLE OF CITED AUTHORITIES

Brady vs. Maryland, 373 US 83 (1963.)

Chambers vs. Mississippi, 410 US 284 (1973.)

Olden vs. Kentucky, 488 US 227 (1988.)

U.S. vs. Augers, 427 US 103 (.)

U.S. vs. Bagley, 473 US 667 (1985.)

U.S. vs. Burr, 25 F.Cas.30, 4 Cranch 470 (1807)

U.S. vs. Dunnigan, US , 113 S.Ct.1111 (1993)

U.S. vs. Valenzela-Bernal, 458 US 858, 873 (1982.)

Washington vs. Texas, 388 US 14 (1967)

PUBLISHER'S NOTE:

THE FOLLOWING PAGE Is UNAVAILABLE FOR FILMING:

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REPORT OF THE OPINION OF THE THIRD CIRCUIT

The opinion of the Third Circuit Court of Appeals has not been reported as of this date.

JURISDICTION

The judgment of United States Court of Appeals for the Third Circuit was entered on January 22, 1996 and this petition is filed within 90 days of that date. The petitioner, Robert Boggi was resentenced on March 21, 1996. Rule 13.1

STATUTES, RULE AND CONSTITUTIONAL PROVISION INVOLVED

1. Sixth Amendment to Constitution of the United States

2. 18 USC Section 1962(c) Racketeering - It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which effect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

3. 29 USC Section 186 (b) (Unlawful Receipt of Money by a Union Official

4. 18 USC Section 1951 (Extortion Conspiracy)

The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

5. United States Sentencing Guidelines (1989) Sections 2C1.1, 2B3.2(a), 2B3.3 and 3C1.1

2C1.1 Offering, Giving, Soliciting, or receiving a Bribe; Extortion Under Color or Official Right.

(a) Base Offense Level: 10

(b) Specific Offense Characteristics

(1) If the offense involved more than one bribe, increase by two levels.

(2) (If more than one applies, use the greater):

(A) If the value of the bribe or the benefit received, or to be received, in return for the bribe exceeded $2,000.00, increase by the corresponding number of levels from the table in §2F1.1 (Fraud and Deceit).

(B) If the offense involved a bribe for the purpose of influencing an elected official or any official holding a high level decision-making or sensitive position, increase by 8 levels.

(c) Cross References

(1) If the bribe was for the purpose of concealing or facilitating another criminal offense, apply §2X3.a (Acessory After the Fact) in respect to such other criminal offense if the resulting offense level is greater than that determined above.

(2) If the offense involved a threat of physical injury or property destruction, apply §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage) if the resulting offense level is greater that that determined above.

§2B3.2(a) Extortion by Force or Threat of Injury or Serious Damage

(a) Base Offense Level: 18

§2B3.3 Blackmail and Similar Forms of Extortion

(a) Base Offense Level: 9

(b) Specific Offense Characteristic

(1) If the greater of the amount obtained or demanded exceeded $2,000, increase by the corresponding number of levels from the table in §2F1.1.

§3C1.1 Willfully Obstructing or Impeding Proceedings

If the defendant willfully impeded or obstructed, or attempted to impede or obstruct the administration of justice during the investigation or prosecution of the instant offense, increase the offense level by two levels.

STATEMENT OF THE CASE

1. BACKGROUND

Robert Boggi respectfully petitions this Court for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered on January 22, 1996, affirming the judgment of

conviction and vacating the judgment of sentence, and remanding to the District Court for the Eastern District of Pennsylvania for resentencing in a manner consistent with the opinion of the Third Circuit Court of Appeals. The petitioner, Robert Boggi, was resentenced on March 21, 1996.

Robert Boggi was indicted by a Superseding Indictment on May 6, 1994, which charged him with violation of 18 USC Section 1962 (c) Racketeering, 29 USC Section 186 (b) Unlawful Receipt of Money by a Union Official, and 18 USC Section 1951 Extortion Conspiracy. The jury convicted the defendant of Count One-Racketeering, although the jury determined that three of the eight acts alleged were not proved, and the defendant was also convicted of Counts Three, Four and Five and was acquitted of Count Two.

The defendant, who was a union officer, was accused of extorting payments and of accepting gifts from several contractors between the years 1984 and 1990. The

principal evidence presented by the prosecution was the testimony of the contractors, all, but one of whom received immunity, and none of the said contractors had complained to the authorities until contacted by the government. Three of the principal witnesses had been sued or picketed by the defendant's union, after the alleged payments, and even then they did not mention the payments to anyone.

2. **CONCEALMENT OF WITNESS AND FAILURE TO AFFORD COMPULSORY PROCESS**

Prior to the commencement of the trial, the prosecution supplied the defendant with copies of exculpatory recorded telephone conversations between the defendant and one Michael Marrone. The telephone conversations were record by government agents and contained bribe offers to the defendant, which were rejected by him. The defendant thereafter unsuccessfully attempted to locate Michael Marrone for the purpose of interviewing him to obtain evidence favorable to the defendant and

to subpoena him to testify at the trial, and finally served the subpoena upon the United States Attorney, who stated that he would not act as a process server for the defendant and further refused to disclose the whereabouts of Mr. Marrone, although the government never denied that it knew the location of Mr. Marrone. The trial court refused to enforce the said subpoena, and thereby precluded the defendant from presenting evidence which was both relevant and favorable to him.

3. **DETERMINING THAT IF THE JURY DISBELIEVES THE DEFENDANT'S ENTIRE TESTIMONY THAN THE TRIAL COURT IS REQUIRED TO FIND THAT HE OBSTRUCTED OR IMPEDED JUSTICE AND THAT HIS SENTENCE MUST BE ENHANCED**

The jury found the defendant guilty of several of the charges filed against him, however it also found him not guilty of one count, and determined that three of the eight acts alleged in the Racketeering Count were not proved. In addition the defendant, in his testimony, did admit to one of the charges,

which was that he received two Super Bowl tickets from a contractor. Robert Boggi was therefore penalized for exercising his constitutional right to plead not guilty and to testify in his own defense, without any prior warning that his sentence would be increased if he so exercised this right.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit was filed on January 22, 1996 and has not yet been published, but a copy is attached as Appendix A to this petition. The Amended Memorandum Order of the District Court for the Eastern District of Pennsylvania is attached as Appendix B, however, at the time of preparing this petition, the transcript of the sentencing hearing of March 21, 1996 was not yet available.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

1. DENIAL OF COMPULSORY PROCESS AND CONCEALMENT OF WITNESS

The defendant, Robert Boggi, was denied the right to compulsory process, as provided in the Sixth Amendment to the United States Constitution. The prosecution at first acknowledged that the testimony of Michael Marrone was exculpatory and then proceeded to deny the defendant access to Mr. Marrone. It would have been equally beneficial to the defense to present the testimony of Michael Marrone to the jury and to have interviewed him in order to lead to other evidence which also would have been beneficial to the defendant. The concealment of Michael Marrone was a violation of the mandate set forth in Brady vs. Maryland, 373 US 83 (1963.) The prosecution never denied knowing the location of Mr. Marrone, but only stated in response to the defendant's request for additional discovery, that such information was neither exculpatory nor relevant. The right of compulsory process is a constitutional right, which has always been preserved by this court beginning with U.S. vs. Burr, 25 F.Cas.30,

4 Cranch 470 (1807) and continuing in Washington vs. Texas, 388 US 14 (1967) and Chambers vs. Mississippi, 410 US 284 (1973.) The concealment of Mr. Marrone resulted in the defense being prohibited from probing the motivation in recording the conversations, the inducements made to him, and his relationship and conversations with the contractors who had testified. The prosecution based its denial upon the assertion that Mr. Marrone had no relevant information, however it is for the defense to evaluate evidence on its own in order to determine if it is favorable and relevant. Questions as to the relevancy of evidence must be balanced in favor of the defendant, Olden vs. Kentucky, 488 US 227 (1988.) The right to a fair trial requires that compulsory process be available to a defendant, and it is only required that there be a "plausible showing that the testimony...would have been material and favorable to the defense, in ways not nearly cumulative to the testimony of

available witnesses," U.S. vs. Valenzela-Bernal, 458 US 858, 873 (1982.) "The existence of any small piece of evidence favorable to the defense may, in a particular case, create just the doubt that prevents the jury from returning a verdict of guilty," U.S. vs. Bagley, 473 US 667 (1985.) The tape recorded conversations, wherein the defendant refused to accept money, coupled with the testimony of Mr. Marrone was just this sort of evidence, and was the very heart of the defense and would have had significant probative value.

The trial court added to the error, by refusing to permit the jury to hear the conversations between the defendant and Michael Marrone, which had been recorded by the government. It was also determined that the recorded conversations were not relevant and that the testimony of the government agent who supervised the recording of the conversations, and who was in court, was also not relevant.

2. FAILURE TO SUPPLY THE DEFENDANT WITH THE DATES OF THE ALLEGED ACTS AND THE FURTHER FAILURE TO ADVISE THAT MAJOR PROSECUTION WITNESSES HAD SIGNIFICANTLY CHANGED THEIR TESTIMONY

Pursuant to a discovery order, the defense was supplied with copies of interviews and the grand jury testimony of potential witnesses, but did not receive the dates of the alleged acts attributed to the defendant until the date of the trial, and even then the dates were not specific but spoke in terms of months, seasons or quarters. The purpose of a Bill of Particulars is to permit a defendant to prepare a defense, Wardius vs. Oregon, 412 US 470, 474-475 (1973.) A trial is not a game, and there must be a balancing "of forces between the accused and his accuser . . . discovery must be a two way street. The State may not insist that the trial be run as a 'search for truth' so far as defense witnesses are concerned while maintaining 'poker game' secrecy for its own witnesses." The

defendant, being unable to obtain the dates of the alleged acts from the prosecution, issued its own subpoena to Dadek and Olga Magac, two of the prosecution's principal witnesses, and requested copies of canceled checks. The issuance of the subpoena caused a dramatic alteration in the testimony of the Magacs from their prior testimony and statements. The Magacs testified that there were four payments and not three, in order to have their testimony conform to the checks cashed in order to make the alleged payments. The checks identified by Mrs. Magac were made payable to herself or to cash. At the time of trial it was impossible for the defense to identify the checks in question as there were over forty checks between September through December 1988 made payable to Mrs. Magac or to cash. One check in the amount of $7000.00 was made payable to a daughter of one of her employees, and the defense would have had no way of knowing that prior to her testimony at trial, at which time it was too late to locate

and interview her. On the other hand this information was always available to the prosecution, as it had the canceled checks prior to the issuance of the subpoena by the defense. The prosecution is not only required to disclose information of which it has knowledge, but also information it "should have known." See U.S. vs. Augers, 427 US 103

3. **THE MANDATORY REQUIREMENT OF ADDING TWO POINTS TO THE DEFENDANT'S SENTENCE FOR OBSTRUCTING OR IMPEDING THE ADMINISTRATION OF JUSTICE, WHICH RESULTED FROM HIS CONVICTION AFTER HE TESTIFIED ON HIS OWN BEHALF**

The trial court stated that it was required to enhance the sentence of the defendant by two points as a result of his conviction, unless there was a finding that there was insufficient evidence. "I don't see how, in view of his flat denials and the jury's conviction, that you can find otherwise than that he testified falsely on the stand. That being the case, I feel I'm obliged to add the two levels. . . . "And, I believe the

Dunnigan case stands for the proposition that if you exercise your constitutional right to testify and the jury doesn't believe you, that it adds two points to your offense level." Both the trial court and the appellate court relied upon U.S. vs. Dunnigan, 113 S.Ct.1111 (1993) however the Dunnigan case provides for enhancement for obstruction of justice only after there is a specific finding that there was "...a willful impediment to or obstruction of justice, or an attempt to do the same, under the perjury definition..." The Circuit Court of Appeals for the Third Circuit stated in its opinion that . . . "While the district court was not explicit about the materiality of Boggi's denials, the record reflects that Boggi's false testimony denying acceptance or extortion of money and other things of value from any of the contractors. . . was necessarily material. If the jury had believed Boggi's testimony and disbelieved some or all of the other witnesses who offered conflicting testimony, then Boggi would not have been

convicted. This determination of materiality is implicit in the district court's reasoning and is clear from our independent review of the record." If the Dunnigan case, in fact holds that a defendant who in testifying flatly denies the allegations, then he is guilty of obstruction of justice and that his sentence must be enhanced by two points, then the sentencing guidelines should clearly state that a defendant who is convicted after testifying in his own behalf shall have his sentence enhanced by two points. This, of course, would be a chilling factor for any defendant to consider, when attempting to mount a defense, and especially as in the instant case, where Mr. Boggi's testimony amounted to a "flat denial" of the charges. Is this, therefore, any different than entering a plea of "not guilty?"

SUMMARY

For the foregoing reason, petitioner Robert Boggi prays that this Court grant his petition for a Writ of Certiorari to review the judgment and opinions of the United States Court of Appeals for the Third Circuit and of the District Court for the Eastern District of Pennsylvania.

Respectfully submitted,

Ronald Ervais and Edward V. Schulgen
Attorneys for Petitioner
Robert Boggi

Appendix

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA:		
	:	
v.	:	**CRIMINAL NO. 94-145-1**
	:	
ROBERT BOGGI	:	

JUDGMENT and COMMITMENT ORDER

AND NOW, this 21st day of March, 1996, following a resentencing hearing held upon issuance of the Mandate of the United States Court of Appeals for the Third Circuit remanding this matter for resentencing consistent with the Opinion of the Court of Appeals in United States v. Boggi, 74 F.3d 470 (3d Cir. 1996), it is ORDERED that the sentence imposed by this Court on January 25, 1995 is VACATED and sentence is imposed on the defendant as follows:

1. Defendant is sentenced at Offense Level 26, Criminal History I.

2. On Counts 1 and 5, defendant is committed to the custody of the Attorney General for a period of 63 months. On Counts 3 and 4, defendant is committed to the custody

of the Attorney General for a period of 60 months. The sentences imposed on Counts 1 and 5 and Counts 3 and 4 are to run concurrently. Because of defendant's diabetes and other medical problems, it is recommended that he be housed in a facility which will enable him to get proper treatment for his illness. Additionally, the Court recommends that defendant remain in this area to enable frequent visitation by members of his family. Defendant shall self-report to the designated institution on Monday, April 29, 1996 by 2:00 p.m.

3. A fine in the amount of $12,500 is imposed, payments toward which are to begin while defendant is in custody.

4. Upon release from confinement, defendant shall be placed on supervised release for a period of three (3) years. During this time, defendant shall:

a. comply with the standard terms and conditions of this manner of supervision;

b. resign from any position he holds with The United Brotherhood of Carpenters and

Joiners of America, Local 1073 and the Metropolitan District Council. Defendant shall not be permitted to hold office or assume any fiduciary responsibility with any union or labor organization during any unexpired term of imprisonment or supervised release;

c. make payments toward any unpaid balance of his fine in such installments approved by the Court, on recommendation of the probation office;

d. comply with the forfeiture requirements as detailed in the Order of Forfeiture, stipulated to by the parties on August 3, 1994;*

e. pay a special assessment of $200.00.*

S\ NORMA L. SHAPIRO

J.

Appendix "A"

Filed January 22, 1996

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 95-1031, 95-1109

UNITED STATES OF AMERICA,
Appellant in No. 95-1109

v.

ROBERT BOGGI,
Appellant in No. 95-1031

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(D.C. Crim. No. 94-cr-00145)

Argued: October 10, 1995

Before: STAPLETON, McKEE and NORRIS, *Circuit Judges**

(Filed January 22, 1996)

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*The Honorable William A. Norris, Senior Circuit Judge for the Ninth Circuit, sitting by designation.

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OPINION OF THE COURT

McKEE, *Circuit Judge.*

This matter involves an appeal by Robert Boggi from a final judgment of conviction and sentence following a criminal jury trial in the United States District Court for the Eastern District of Pennsylvania, and a cross-appeal by the United States. The Government challenges the district court's interpretation and application of the Sentencing Guidelines. Although we find no merit to the trial errors alleged by Boggi and therefore will affirm the judgment of conviction, we conclude that the district court applied the incorrect Guideline provision in calculating Boggi's sentence. Therefore, we will remand the matter to the district court with instructions to recalculate the sentence using the appropriate Guideline.

I. BACKGROUND FACTS AND PROCEDURAL HISTORY

From 1984 until his conviction in this case in 1994, Robert Boggi was the business agent for Philadelphia-based Local 1073 of the United Brotherhood of Carpenters and Joiners of America ("UBC"). The UBC is an international union consisting of numerous affiliated local unions and district councils throughout the United States and Canada which represent carpenters and other types of skilled

tradespersons. As business agent for Local 1073, Boggi was responsible for overseeing the daily operations of the union whose members were primarily engaged in residential carpentry. On May 6, 1994, a federal grand jury returned a superseding indictment against Boggi, charging him with exacting numerous illegal payments and gifts from contractors between 1984 and 1990. Specifically, Boggi was charged with one count of racketeering, in violation of 18 U.S.C. § 1962(c) (Count 1); three counts of unlawful receipt of money or a thing of value by a union official, in violation of 29 U.S.C. § 186 (Counts 2-4); and one count of extortion conspiracy, in violation of 18 U.S.C. § 1951 (Count 5). The indictment also sought the forfeiture of the racketeering proceeds pursuant to 18 U.S.C. § 1963 (Count 6).

On August 2, 1994, following a seven-day trial, the jury returned a guilty verdict on several of the RICO related offenses including racketeering, extortion, and extortion conspiracy. Thereafter, Boggi filed a motion for judgment of acquittal or, in the alternative, for a new trial. On December 29, 1994, the district court denied Boggi's motion, and on January 5, 1995, the district court sentenced Boggi to 48 months imprisonment. The district court ruled that U.S.S.G. § 2C1.1, which establishes penalties for extortion by public officials, was the applicable Guideline provision and sentenced Boggi accordingly. In doing so, the court overruled the Government's argument that the applicable Guideline was U.S.S.G § 2B3.2. This appeal and cross appeal followed.

II. DISCUSSION

A.

Boggi alleges numerous trial errors. He complains that the district court improperly excluded certain evidence that would have established his reputation for good character, that the dates of the crimes charged were impermissibly vague, that the evidence was insufficient to support the verdict, and that the prosecution should have been barred by the statute of limitations. The district court carefully, and correctly evaluated each of these claims in the

Memorandum Opinion it filed in support of its denial of Boggi's post-verdict motion for acquittal, and we need not reexamine these issues here.

We focus our attention instead on the Government's cross-appeal which challenges the district court's interpretation and application of the Sentencing Guidelines. The Government argues that the district court improperly applied § 2C1.1 of the Sentencing Guidelines to Boggi's extortion offenses and that the applicable Guideline was § 2B3.2.

The district court applied the Guideline manual effective November 1, 1989 because the last offense charged was in 1990, and the court's application of the 1989 version of the Guidelines is not contested. In order to appreciate the impact of the sentencing error alleged by the Government, it is necessary to first review how the district court calculated the sentence it imposed. The court first separated the counts of conviction into three groups of closely related counts pursuant to U.S.S.G. § 3D1.2. Group One consisted of most of the racketeering acts, which constituted Taft-Hartley Act violations including the receipt of payments from Samuel Kaufman, a business man who ran a company that did carpentry contracting and frequently hired non-union workers. Group Two consisted of racketeering acts arising from payments the Property Corporation of America ("PCA") made in order to avoid picketing at the Polo Run apartment development where certain contracts had been awarded to non-union workers. Group Three consisted of racketeering acts arising from payments received from Al Bienenfeld, owner of Leslie Homes, Inc., a residential real estate development company, in connection with work being done by non-union workers at a condominium development.

Section 2E1.1 of the Guidelines assigns a RICO violation the greater of a base offense level of 19 or the offense level of the underlying racketeering acts. In order to determine the sentence it was therefore necessary for the district court to calculate the offense level of the underlying racketeering activity, then compare the result with the alternative minimum base offense level applicable to RICO.

The court applied § 2E5.6 to Group One and determined that the base offense level was 10.[1] The court then added two levels for abuse of a position of trust (§ 3B1.1), three levels corresponding to the value of cash and goods received by Boggi (§ 2F1.1), and two more levels for obstruction of justice (§ 3C1.1), bringing the total offense level for Group One to 17. App. at 1302-08.

The court applied § 2C1.1 to the offenses in Group Two, which included the PCA payments. In doing so, the court rejected the recommendation of the presentence investigation and the Government, as they both recommended that the court apply § 2B3.2 to this Group of offenses. Section 2C1.1 yielded a base offense level of 10. The court applied a five-level increase corresponding to the amount of money extorted (§ 2F1.1), a two-level increase for abuse of a position of trust (§ 3B1.1), and a two-level increase for obstruction of justice (§ 3C1.1), bringing the total offense level for Group Two to 19. App. at 1309.

The court also applied § 2C1.1 to Group Three which included the payments from Al Bienenfeld. That Guideline resulted in a base offense level of 10. The court then applied a one-level increase corresponding to the amount of the extortionate payment (§ 2F1.1), a two-level increase for abuse of a position of trust (§ 3B1.1), and a two-level increase for obstruction of justice (§ 3C1.1), bringing the total offense level for Group Three to 15. App. at 1313.

The rules for combining the offense levels of the three groups, set forth at § 3D1.4, yielded a combined offense level of 22. App. at 1314. Applying the alternative minimum base offense level of 19, *see* § 2E1.1(a), to the RICO offenses yielded a total offense level of 23, after two levels each were added for abuse of a position of trust (§ 3B1.1) and obstruction of justice (§ 3C1.1). App. at 1314. Because the minimum base level of 19 yielded the greater total offense level (23 instead of 22), the court sentenced Boggi based upon that calculation. Thus, the court concluded that the total offense level was 23 and the Guideline imprisonment

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1. A subsequent amendment to the Guidelines deleted § 2E5.6 by consolidating it with § 2E5.1, effective November 1, 1993.

range was 46-57 months. App. at 1314. The court sentenced Boggi to 48 months imprisonment. App. at 1345.

By contrast, had § 2B3.2 been applied, the Guideline calculations would have been as follows: The total offense level for Group One remains at level 17; Group Two becomes a total offense level of 23 (base offense level 18, plus one-level corresponding to the amount of the extortion as per § 2B3.1, plus two-levels for abuse of a position of trust, plus two-levels for obstruction of justice); Group Three becomes a total offense level of 22 (same as Group Two except that the amount of money extorted results in no increase). Under the rules for combining the groups set forth at § 3D1.4, the combined offense level becomes 26 (which is higher than the alternative minimum RICO calculation of 23), corresponding to 63-78 months imprisonment, which is, at a minimum, 15 more months imprisonment than the 48 months to which Boggi was sentenced under the district court's calculation.

When the district court decided to apply § 2C1.1 to the extortion offenses (Groups Two and Three) rather than § 2B3.2, the Government objected based upon the relevant Guideline commentary which instructs that § 2B3.2 should ordinarily be applied to a threat to cause labor problems. *See* USSG § 2B3.2, comment. (n.2). The district judge then responded:

> Yeah, but that's ordinarily. This is different than ordinarily because it seems to me that the threat and the bodily — there was no bodily injury. There certainly wasn't any serious bodily injury. There was — no one's ever argued there was permanent or life-threatening bodily injury.

App. at 1311. The Government further argued that § 2C1.1 was clearly inapplicable because, by its terms, it addressed public officials acting under official right, whereas Boggi was a private union officer. App. at 1312.

Our analysis of the appropriate Guideline to be applied here must, of course, begin with the text of the Guidelines in question. Section 2C1.1, the Guideline applied by the district court, states in part:

Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right

(a) Base Offense Level: 10

(b) Specific Offense Characteristics

(1) If the offense involved more than one bribe or extortion, increase by 2 levels.

(2) (If more than one applies, use the greater):

(A) If the value of the payment, the benefit received or to be received in return for the payment, or the loss to the government from the offense, whichever is greatest, exceeded $2,000, increase by the corresponding number of levels from the table in § 2F1.1 (Fraud and Deceit).

(B) If the offense involved a payment for the purpose of influencing an elected official or any official holding a high level decision-making or sensitive position, increase by 8 levels.

USSG § 2C1.1.

By comparison, § 2B3.2, entitled "Extortion by Force or Threat of Injury or Serious Damage," states in relevant part:

(a) Base Offense Level: 18

(b) Specific Offense Characteristics

(1) If the offense involved an express or implied threat of death, bodily injury, or kidnapping, increase by 2 levels.

(2) If the greater of the amount demanded or the loss to the victim exceeded $10,000, increase by the corresponding number of levels from the table in § 2B3.1(b)(6).

(3) . . .

(B) If the offense involved preparation to carry out a threat of (i) death, (ii) serious bodily injury, (iii) kidnapping, or (iv) product tampering; or if the

> participant(s) otherwise demonstrated the ability to carry out such a threat, increase by 3 levels.

USSG § 2B3.2.

Because neither the text of § 2C1.1 nor § 2B3.2 mentions union officials or labor disputes per se, we will look to the application notes and commentary for instruction on which of these two Guidelines should be applied under the facts before us. *See United States v. Bierley*, 922 F.2d 1061, 1066 (3d Cir. 1990). The "commentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." *Stinson v. United States*, ___ U.S. ___, 113 S. Ct. 1913, 1915 (1993). A court's "[f]ailure to follow such commentary could constitute an incorrect application of the guidelines, subjecting the sentence to reversal on appeal." USSG § 1B1.7.

According to the background commentary, § 2C1.1 "applies to a person who offers or gives a bribe for a corrupt purpose, such as inducing a public official to participate in a fraud or to influence his official actions, or to a public official who solicits or accepts such a bribe." USSG § 2C1.1, comment. (backg'd.). The background commentary further instructs:

> Section 2C1.1 also applies to *extortion by officers or employees of the United States* in violation of 18 U.S.C. § 872, *and Hobbs Act extortion, or attempted extortion, under color of official right*, in violation of 18 U.S.C. § 1951. The Hobbs Act, 18 U.S.C. § 1951(b)(2), applies in part to any person who acts "under color of official right." This statute applies to extortionate conduct by, among others, officials and employees of state and local governments. The panoply of conduct that may be prosecuted under the Hobbs Act varies from a city building inspector who demands a small amount of money from the owner of an apartment building to ignore code violations to a state court judge who extracts substantial interest-free loans from attorneys who have cases pending in his court.

Id. (emphasis added).

The commentary to § 2B3.2, the provision which the Government argues should have been applied, states:

> This guideline applies if there was any threat, express or implied, that reasonably could be interpreted as one to injure a person or physically damage property, or any comparably serious threat, such as to drive an enterprise out of business. *Even if the threat does not in itself imply violence*, the possibility of violence or serious adverse consequences may be inferred from the circumstances of the threat or the reputation of the person making it. An ambiguous threat, such as "pay up or else," or *a threat to cause labor problems, ordinarily should be treated under this section.*

USSG § 2B3.2, comment. (n.2) (emphasis added).

It is therefore clear from the relevant commentary that § 2B3.2 does not require the threat of serious bodily injury for its application. There is evidence regarding Boggi's actions as a union agent and his threats to cause labor problems which would support the application of § 2B3.2. Although we have not previously reviewed a district court's construction and application of § 2B3.2 in the labor union context, other courts of appeals have, and our conclusion here is consistent with the reasoning of those courts.

In *United States v. Penn*, 966 F.2d 55 (2d Cir. 1992), the Court of Appeals for the Second Circuit upheld a district court's sentence under § 2B3.2 following the defendant's guilty plea to a charge of extortion. The court rejected the defendant's arguments that he should have been sentenced under the more lenient provisions of § 2B3.3 which addresses "Blackmail and Similar Forms of Extortion." There, the defendant, Terrance Penn, had posed as an INS agent and threatened to shut down a service station that employed illegal aliens unless the owner of the service station acceded to Penn's demand of a cash payment. The service station owner "testified that he believed Penn was capable of physical bodily harm, and that he feared the station would be put out of business if Penn carried out his threats." *Id.* The district court found that Penn's initial demand for cash, his intimidating tactics, and his implicit and explicit threats to put the service station owner out of

business justified sentencing under § 2B3.2. *Id.* The court of appeals affirmed saying: "the record clearly supports an inference that Penn sought to generate fear through physical intimidation and through explicit and implicit threats of serious economic injury. Thus, Penn's conduct fits squarely under § 2B3.2." *Id.* at 57.

In *United States v. Williams*, 952 F.2d 1504 (6th Cir. 1991), the court of appeals found no error in the district court's application of § 2B3.2 in sentencing a defendant on extortion offenses where the "defendant's exploitation of the victims' fears was based on the implied threat that, unless payments were forthcoming, . . . the victims would suffer a devastating economic loss." *Id.* at 1514. Although the defendant in *Williams* argued for the application of § 2C1.1 as an alternative, the court rejected this argument, explaining:

> Section 2C1.1 is designed for the punishment of a person who bribes a public official or 'a public official who solicits or accepts such a bribe.' USSG § 2C1.1, comment. (backg'd.). Defendant, however, was not a public official, and [the] Sheriff . . . , whose political force was the weapon employed by defendant, was to be bribed in a matter not involving his official actions . . . .

Id. Thus, the court concluded that "the implicit threats employed by the defendant bring his case within the ambit of section 2B3.2." *Id.* The court further concluded that "the fact that neither defendant nor his shadowy counterpart, [the] Sheriff . . . , were to take any official action in exchange for a bribe tends to take this case out of the operation of section 2C1.1." *Id. See also United States v. Hummer*, 916 F.2d 186, 194 (4th Cir. 1990) (observing that from the language of § 2B3.2's commentary note 2 "a reasonable inference can be drawn that the Commission contemplated extortion threats to harm one or a few persons, to damage property, or to economically injure or ruin a business enterprise").

Here, as in *Williams*, the district court had no sound basis for treating Boggi's extortion offenses as bribes, and sentencing Boggi under the Guideline provision directed at

bribery involving public officials. Boggi was not a public official and he did not accept money in exchange for action involving any official duties. Although Boggi did violate a position of trust as he violated the trust that his union members had placed in him, such a breach occurs whenever a union official engages in extortion. The comments to § 2B3.2 clearly establish that the Sentencing Commission did not intend that such breaches would be treated the same as a public official who violates the public's trust. Similarly, the commentary establishes that the Commission did not intend that a sentencing court would require that extortionate threats be accompanied with threats of serious bodily injury before they would fall within the scope of § 2B3.2. Here, the Government established Boggi's blatant "threat[s] to cause labor problems" and that conduct falls within the parameters of § 2B3.2.

The evidence would support a finding that Boggi used explicit and implicit threats of labor strikes and labor unrest that would result in economic injury, or ruin, for a given project. PCA and Bienenfeld both acquiesced in Boggi's demands so that Boggi would not use his position with the labor union to inflict serious economic harm. Bienenfeld testified that if Boggi had ordered the union carpenters to leave the construction site leaving only the non-union workers, the disruption of work would have caused Bienenfeld's lender to foreclose and revoke a $10 million loan within a matter of hours. App. at 861-62. Similarly, Dean Wilson, a partner in PCA, testified that he and the other partners were personally liable for $12 million and that a picket line by Boggi's union could have spelled disaster for the project. App. at 168-73. Boggi's threats were also taken seriously by James Bormann, the superintendent at Polo Run. Bormann testified that Boggi always behaved in an intimidating manner and would generally conclude his visits to Polo Run by vowing to "take his business to the streets." App. at 186-87. Boggi's behavior caused Bormann to hire additional security at Polo Run, erect fences at the work site, and vary his commuting route. App. at 94, 186. Thus, Bormann's testimony would support a finding that Boggi had used threats of physical injury. Otherwise there would have been

no reason for Bormann to vary his route to and from the construction site. However, Boggi's threats also included an unmistakable threat to cause economic harm to the projects and persons involved. Should the district court on remand find that Boggi's threats to cause labor problems had explicitly or implicitly involved threats either of physical injury or of complete economic ruin, § 2B3.2 would anticipate and encompass precisely this sort of conduct. *See* § 2B3.2, comment. (n.2) ("Even if the threat does not in itself imply violence, the possibility of violence or serious adverse consequences may be inferred from the circumstances of the threat or the reputation of the person making it.").

Our decision in *United States v. Inigo*, 925 F.2d 641 (3d Cir. 1991), is not to the contrary. In *Inigo*, we addressed whether § 2B3.2 or § 2B3.3 (the blackmail Guideline) applies to a Hobbs Act conviction involving commercial extortion. The defendant in *Inigo* had threatened to set up a manufacturing plant based on trade secrets stolen from the DuPont company unless he was paid $10 million. The district court applied the extortion provision, § 2B3.2, to the blackmail offense. We held that § 2B3.2 had been misapplied and that § 2B3.3, the blackmail provision, was the applicable Guideline. In so holding, we explained:

> Both the blackmail and extortion section talk about a demand for money. The difference between them lies in the kind of harm threatened. We hold that the extortion section requires either a physical threat or an economic threat so severe as to threaten the existence of the victim. No such threat was made in this case.

Id. at 659. The district court may properly find on this record, however, that Boggi used just this type of threat in threatening the economic existence of PCA and the economic ruin of Bienenfeld.

Inigo does not control here because the commentary to § 2B3.2 specifically states that a court should ordinarily apply that Guideline to threats, such as Boggi's, "to cause labor problems." Indeed, any other interpretation would run afoul of *Stinson*'s holding that the Guidelines commentary is authoritative except in very narrowly prescribed

circumstances, none of which is present here. *See Stinson*, 113 S. Ct. at 1915. If the district court finds, however, that no victim could reasonably have interpreted one of Boggi's threats "as one to injure a person or physically damage property, or any comparably serious threat, such as to drive an enterprise out of business," § 2B3.2, comment. (n.2), then the court may sentence Boggi pursuant to § 2B3.3.

Although it is not clear from the record whether § 2B3.2 or § 2B3.3 is appropriate here, it is quite clear that § 2C1.1 is inapplicable to this case. Section 2C1.1 has consistently been applied to bribery or extortion involving public officials in this circuit. In *United States v. Badaracco*, 954 F.2d 928 (3d Cir. 1992), the defendant pled guilty to four counts of defrauding a bank of which he was an officer and urged the district court to use the "value of the benefit received" formula set forth in § 2C1.1 to calculate the loss attributable to his fraud. *Id.* at 936. We held that the district court properly declined to do so, and in so holding we explained that "[s]ection 2C1.1 deals with the bribery of public officials or extortion under color of official right and is inapplicable to this case." *Id.* at 936 n.8. Also, in *United States v. Schweitzer*, 5 F.2d 44 (3d Cir. 1993), we found no problem with the district court's application of § 2C1.1 where the defendant pled guilty to conspiracy to bribe a public official to obtain confidential information held by the Social Security Administration. However, we remanded for resentencing because the district court cited an inappropriate factor to justify its upward departure from the sentence recommended by § 2C1.1. *Id.* at 47-48.

In sum, the district court erroneously applied § 2C1.1 in fashioning Boggi's sentence. At resentencing, the district court must make the necessary factual findings to determine whether § 2B3.2 or § 2B3.3 is the appropriate Guideline. If the court finds that a victim could reasonably have interpreted Boggi's threats to cause labor problems as express or implied threats of violence to person or property, or of economic harm so severe as to threaten the existence of the victim, then the district court may resentence Boggi pursuant to § 2B3.2. If, however, the court finds that there was clearly no such threat of violence or economic ruin, then it may properly apply § 2B3.3.

B.

In his reply to the Government's cross-appeal, Boggi presents two arguments which he raises here for the first time. First, Boggi argues that the district court erred in finding that he abused a position of trust in committing the offenses and in adding a corresponding two-level increase pursuant to § 3B1.3 in each of the three offense groups. Second, Boggi contends that the district court erred in concluding that he perjured himself at trial and therefore was subject to a two-point adjustment for obstruction of justice pursuant to § 3C1.1.

"As a general matter, the courts of appeals will not consider arguments raised on appeal for the first time in a reply brief." *Hoxworth v. Blinder, Robinson & Co.*, 903 F.2d 186, 204-05 n.29 (3d Cir. 1990). We follow this rule so that appellees are not prejudiced by the lack of an opportunity to respond to issues raised for the first time in an appellant's reply brief. *See Wright v. Holbrook*, 794 F.2d 1152, 1156 (3d Cir. 1986). However, because of the cross-appeal in this case, the Government has had an opportunity to respond to the arguments raised in Boggi's reply brief. Furthermore, Boggi's second argument raises a question which we feel requires clarification in this circuit. Therefore, we deviate from the general rule primarily to address this question. Before doing so, however, we will briefly address Boggi's first argument.

The district court's determination that Boggi abused his position of trust in the union is subject to review for clear error. *See United States v. Craddock*, 993 F.2d 338, 340 (3d Cir. 1993). The district court determined that, "as a Business Agent of the Metropolitan District Council and also as an officer of Local 1073, [Boggi] was in a position of trust with regard to the union members who elected him to represent their interests." App. at 1303-04. The evidence established that Boggi's union position was central to his commission of the offenses proved at trial, and we therefore cannot say that the district court's finding was clearly erroneous. The jury's finding that Boggi conducted and participated in the affairs of the union through a pattern of racketeering activity and betrayed the union membership to enrich himself provides ample support for the district

court's upward departure. We conclude that the district court properly increased Boggi's offense level by two points for abuse of a position of trust.

The district court's determination that Boggi perjured himself at trial is also subject to review for clear error. *See United States v. Cusumano*, 943 F.2d 305, 315 (3d Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 881 (1992). Boggi argues that under *Dunnigan v. United States*, ___ U.S. ___, 113 S. Ct. 1111 (1993), sentence enhancement for obstruction of justice is appropriate only after there has been a review of the evidence and a specific finding that there was a "willful impediment to or obstruction of justice, or an attempt to do the same, under the perjury definition ...." *Id.* at 1117. Boggi contends that the district court failed to make the requisite independent finding. We disagree.

The district court found that Boggi perjured himself at trial, observing: "I don't see how, in view of his flat denials and the jury's conviction, that you can find otherwise than that he testified falsely on the stand. That being the case, I feel I'm obliged to add the two levels." App. at 1305. The issue posed to the jury, *inter alia*, was whether Boggi was guilty of the extortion offenses charged. The jury listened to testimony including Boggi's testimony that he was innocent, evaluated the credibility of the witnesses, and weighed the evidence. In convicting Boggi, the jury necessarily rejected his testimony that he was innocent of the extortion offenses charged. In sentencing Boggi, the district properly considered this fact and properly reasoned that "a guilty verdict, not set aside, binds the sentencing court to accept the facts necessarily implicit in the verdict." *United States v. Weston*, 960 F.2d 212, 218 (1st Cir. 1992). *Cf. Barber v. CSX Distrib. Servs.*, 68 F.3d 694, 700 (3d Cir. 1995).

Although *Dunnigan* states that "it is preferable for a district court to address each element of the alleged perjury in a separate and clear finding," 113 S. Ct. at 1117, express separate findings are not required. *See id.* ("The district court's determination that enhancement is required is sufficient . . . if . . . the court makes a finding that encompasses all of the factual predicates for a finding of

perjury."); *United States v. Matiz*, 14 F.3d 79, 84 (1st Cir. 1994). Here, the district court's determination that Boggi perjured himself at trial encompassed all of the elements of perjury — falsity, materiality, and willfulness — and therefore, was sufficient under *Dunnigan*. This is demonstrated by the district court's characterization of Boggi's testimony as "flat denials," which certainly suggests that the district court believed that Boggi provided false testimony with willful intent, "rather than as a result of confusion, mistake or faulty memory." *Id.* at 1116. While the district court was not explicit about the materiality of Boggi's denials, the record reflects that Boggi's false testimony denying acceptance or extortion of money and other things of value from any of the contractors, App. at 1118-19, was necessarily material. If the jury had believed Boggi's testimony and disbelieved some or all of the other witnesses who offered conflicting testimony, then Boggi would not have been convicted. This determination of materiality is implicit in the district court's reasoning and is clear from our independent review of the record. *See United States v. Tracy*, 36 F.3d 199, 203 (1st Cir. 1994) ("On review, the appeals court must be able to ascertain the ultimate finding and there must be evidence (regardless of whether it has been specifically identified by the district judge) that would permit a reasonable fact finder to make such a determination ...."), *cert. denied*, 115 S. Ct. 609 (1994). Therefore, we conclude that the district court did not err in finding that Boggi perjured himself and enhancing his sentence accordingly. *Cf. United States v. Webster*, 54 F.3d 1, 8-9 (1st Cir. 1995); *United States v. Rodriguez*, 995 F.2d 776, 779 (7th Cir. 1993). In doing so, however, we stress that it is preferable for a district court to specifically state its findings as to the elements of perjury on the record when applying this enhancement. However, where, as here, the record establishes that the district court's application of the enhancement necessarily included a finding as to the elements of perjury, and those findings are supported by the record, we will not remand merely because the district court failed to engage in a ritualistic exercise and state the obvious for the record.

Finally, Boggi claims that the sentence enhancement for perjury effectively penalized him for exercising his right to

testify in his own behalf. This claim, however, was rejected by the Supreme Court in *Dunnigan*, 113 S. Ct. at 1117, where the Court reiterated that "a defendant's right to testify does not include a right to commit perjury." Thus, we find this claim to be without merit.

III. CONCLUSION

For the foregoing reasons, we will affirm the judgment of conviction but the judgment of sentence will be vacated and the case remanded for resentencing in a manner consistent with this opinion.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA:	
	:
v.	:CRIMINAL ACTION
	:
ROBERT BOGGI	:NO. 94-145-1

AMENDED MEMORANDUM

NORMA L. SHAPIRO, J. JANUARY 4, 1995

Defendant Robert Boggi was tried on five counts. Count I alleged a series of acts in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO). See 18 U.S.C.§ 1962(c) (prohibiting the conduct of interstate commerce through a pattern of racketeering). Counts II, III and IV charged violations of the Taft-Hartley Act. See 29 U.S.C. § 186 (prohibiting payments from employers to union officials). Count V charged a violation of the Hobbs Act. 18 U.S.C.§ 1951(prohibiting extortion in interstate commerce).

On August 2, 1994, following a seven-day trial, a jury convicted Boggi on four counts and acquitted him on Count II. Boggi now moves for acquittal and for a new trial. The motions will be denied.

I. Motion for Acquittal

Boggi moved for a judgment of

acquittal at the close of the government's case and again at the close of evidence. The court denied both motions and Boggi now moves for acquittal after discharge of the jury, see Fed.R.Cr.Pro. 29(c); the motion asserts that the dates of the crimes charged were too vague to support a verdict, the evidence was insufficient, and the prosecution was barred by statute of limitations.

The court must view the evidence in the light most favorable to the prosecution in determining whether any rational trier of fact could have found the essential elements of each crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, (1979). In deciding a motion for acquittal, the court may not weigh evidence or make credibility determinations but is confined to assessing the sufficiency of the government's evidence. United States v. Giampa, 758 F.2d 928, 934-35 (3d Cir. 1985).

A. Dates of the Offenses

On June 8, 1994, in response to a motion from Boggi for a bill of particulars, the

court ordered:

(T)he Government shall provide to defendant on or before June 17, 1994 the approximate month as well as year, to the extent now known to the Government, of Racketeering Acts 1, 2, 3, 4, 5, 6, 7A, 7C and 8B alleged in Count I of the superseding indictment and of Counts 2, 3, 4, and 5, to the extent they differ from Racketeering Acts 1, 3, 5, and 8B if such information has not yet been provided by pre-trial discovery made available by the Government to the defense.

On June 17, 1994, the government produced the reports of interviews and grand jury testimony of potential government witnesses on which the government based its knowledge of the dates of the alleged crimes. On July 25, 1994, the day the parties selected a jury, the court ordered the government to provide Boggi with a list setting forth the dates of the alleged crimes, and the government did so by letter later that day.

Boggi alleges that the lack of specificity in the dates of the superseding

indictment prejudiced his ability to defend himself against the charges and to present an alibi defense. He states that the government "had obtained records which should have indicated the aforesaid alleged dates with specificity." The government produced those records for Boggi on June 17, 1994, more than a month before trial, so Boggi was as well informed as the government regarding the dates of the crimes alleged. Furthermore, the government provided a summary of this information prior to the introduction of any evidence.

While an indictment should be as specific as possible regarding the dates of alleged crimes, the government need not prove a precise date if all the elements of a crime can be established without a precise date. See United States v. Schurr, 775 F.2d 549, 559 (3d Cir. 1985). In cases where the exact date of the crime is uncertain, the practice of charging defendants for alleged crimes occurring "on or about" a date is well established. Cf. United States v. Neuroth,

809 F.2d 339, 341-42 (6th Cir. 1987) ("on or about" jury charge appropriate when exact date of alleged crime uncertain), cert. denied 482 U.S. 916 (1987).

Boggi also argues that the government's letter of July 25, 1994 improperly enlarged the indictment. See United States v. Critchley, 353, F.2d 358 (1965) (specific date alleged in indictment cannot be altered by bill of particulars). However, the government's letter in response to a court order did not alter dates alleged in the indictment but stated with more specificity dates stated generally in the indictment. "[A] variance in proof of a date is not material in the absence of some specific evidence of prejudice." United States v. Schurr, 775 F.2d 549, 559 (3d Cir. 1985); see also United States v. Barsanti, 943, F.2d 428, 438-39 (4th Cir. 1991), cert. denied, 112 s. ct. 1474 (1992) (four month difference between date in indictment and proof not prejudicial); United States v. Reed, 887 F.2d 1398, 1403 (11th Cir. 1989) ("[w]hen the government charges that an

offense occurred 'on or about' a certain date, the defendant is on notice that the charge is not limited to the specific date or dates set out in the indictment"), reh'g denied en banc, 891 F.2d 907 (11th Cir. 1989), cert. denied, 493 U.S. 1080 (1990).

B. Sufficiency of the Evidence

1. Count I Act 7 - Property Corporation of America

a. The Magacs' Testimony

Two witnesses, Dadek Magac and Olga Magac, testified at trial that they made four cash payments to Boggi in exchange for a guarantee of labor peace for a company. Boggi argues that because these witnesses previously had testified that there were only three payments, the evidence on Act I Count 7 was insufficient.

Boggi's argument is rejected. The credibility of witnesses is an issue for the jury. United States v. Rockwell, 781 F.2d 985, 990 (3d Cir. 1986). The jurors could reasonably have concluded that the Magacs correctly recalled the number of payments at

Boggi's trial or that any inconsistency with previous grand jury and/or trial testimony was immaterial to the issue of whether money was paid.

b. Count I, Act 7(A)

Boggi argues that the evidence was insufficient to support a conviction on the charged racketeering act of illegally accepting $35,000 from PCA. The verdict was supported by the testimony of three PCA officials and the Magacs. The court does not find that no reasonable jury would have found Boggi guilty on this evidence.

c. Count I, Acts 7(B) and (C)

Boggi also challenges his conviction on the alleged racketeering acts of extortion and extortion conspiracy in count I Act 7(B) and (C). These verdicts were supported by the testimony of Dadek Magac, James Siesser, James Bormann and Dean Wilson. Bormann was a superintendent of a construction site who stated that Boggi and a coconspirator came to a job site and threatened him. Magac testified that Boggi told Magac that Boggi had

to give $10,000 of the cash Magac paid Boggi to another alleged conspirator.

Boggi argues that the guilty verdicts on Count I Acts 7(B) and (C) are inconsistent with its not guilty verdict on Count I Act 2 because Acts 2 and 7 were supported by testimony from the same witness, Dadek Magac. The jury might have concluded that this witness was truthful in one part of his testimony and untruthful in other parts. United States v. Rockwell, 781 F.2d 985, 990 (3d Cir. 1990). Act 7 was corroborated by the testimony of other witnesses. There is no logical inconsistency in the two verdicts as Act 2 alleged payment from 1985 to 1987 whereas Acts 7(B) and (C) alleged payments in 1988.

2. Count I, Acts 8(B) and (C)

Boggi claims that the evidence that he extorted and conspired to extort payments from Leslie Homes, Inc. shows that he was merely present at a construction site. However, Al Bienenfeld testified that Boggi not only attended a meeting where an illegal payment

was demanded but that Boggi actively supported the demand by making it clear that carpenter union members would be pulled off the job if the payment were not made. As the business representative of the Metropolitan District Council including the carpenters' union, Boggi was the conspirator capable of carrying out that threat. Bienenfeld also testified that, after he made the payment, Boggi assured him that the carpenters would stay on the job.

Boggi claims that the government failed to prove an effect on interstate commerce. The government specifically asked the Chief Executive Officer of Leslie Homes, Inc. whether his company purchased materials outside Pennsylvania; he responded that it did and cited examples. See Trial Tr., July 29, 1994, at 77. The jury was entitled to believe the witness so the government met its burden of establishing an effect on interstate commerce. See United States v. Inigo, 925 F.2d 641, 648 (3d Cir. 1991) (Congress intended to reach extortionate crimes that have only a slight effect on interstate

commerce).

3. Count I, Act 5 and Count IV

The court found Boggi violated the provisions of the Taft-Hartley Act, prohibiting payments by an employer to a representative of a "labor organization" that represents, seeks to represent, or would admit to membership" the employer's employees. 29 U.S.C. § 186(a)(2) & (b)(1). The jury found that Boggi accepted Superbowl tickets from the owner of a construction company. Boggi argues that the construction company would not admit to membership his union members because his union, Local 1073 of the United Brotherhood of Carpenters and Joiners of America, only represents residential carpenters but the construction company employed commercial carpenters. However, Boggi testified that he was a business agent of the Metropolitan District Council, which he described as the "governing body of all the local unions." Trial Tr., Aug. 1, 1994, at 7, 9. Boggi stipulated to the fact that the both the local and the Council are "labor organizations

within the meaning" of the statute. See Joint Stipulation of the Parties at 1. The jury could conclude beyond a reasonable doubt that the Council represented commercial carpenter from Boggi's testimony that the Council represented "all the local unions."

Boggi also claims that his violation of the act was "de minimis" and technical." There are no such exceptions to the statutory prohibition.

C. Statue of Limitations

Boggi argues that the government failed to establish that it met the five-year statute of limitations with regard to payments from Samuel Kaufman to Boggi (Count I Act 3 and Count III). The testimony established the last payment occurred some time in May, 1989 but not the exact date in May; the superseding indictment may have been filed more that five years after the last payment.

The precise payment date in May, 1989, is irrelevant because the superseding indictment was identical to the original indictment as to Count I, Act 3, and Count III. Where a

superseding indictment does not expand the charges, the original indictment tolls the statute of limitations. See United States v. Friedman, 649 F.2d 199, 204 (3d Cir. 1981). The original indictment was filed on March 30, 1994, less than five years after the last payment. The prosecution was not barred by the statute of limitations.

II. Motion for a New Trial

Boggi moves for a new trial, see Fed. R. Cr. Pro. 33, on twenty-one grounds. "Motions for a new trial based on the weight of the evidence are not favored" and "are to be granted sparingly and only in exceptional cases. Government of Virgin Island v. Derricks, 810 F.2d 50, 55 (3d Cir. 1987). A new trial may be granted when "the evidence preponderates sufficiently heavily against the verdict that a serious miscarriage of justice may have occurred." United States v. Bevans, 728 F. Supp. 340, 343 (E.D. Pa. 1990), aff'd 914 F.2d 244 (3d Cir. 1990) (quotation omitted).

Boggi argues that the court erred in

failing to grant a mistrial after the testimony of Samuel Kaufman and Al Bienenfeld that they feared Boggi partly because of their memories of the Holocaust. The government, on direct examination asked Kaufman about his fear:

> Q. What are you concerned would happen?
> A. What do you mean would happen? That I'm afraid that he's really going to go break my legs and then he's going to go after my family. And you've got to realize that I'm a Holocaust survivor and nobody touches my family. Money's not that much to me.

Trial Tr. July 28, 1994, at 280. The court overruled objections to the testimony.

The government asked Bienenfeld, also on direct, why he was concerned about Kaufman's

emotional state:

Q. And who else -- what was your third concern?

A. Samuel Kaufman's emotional state.

Q. And why did you have concerns about Mr. Kaufman?

. . . .

A. Samuel Kaufman is a survivor of the Auschwitz, my father is a survivor too. When people come in to your office and tell you you're going to do what they tell you to do or we're going to stop your business or do these kinds of things, immediately you get frightened and you think Nazis. It may not be rational to the average

> person born in this country, but I can tell you its the first response to people like ourselves. The fear is instinctive, whether its real or not, its instinctive. And Sam just had gone through a horrible experience the year before, he lost his closest friend in a wretched automobile accident and his . . .

Trial Tr., July 29, 1994, at 99. The court overruled objections to the testimony but prevented further testimony to Kaufman's "private concerns." Id. at 99-100.

Under the Hobbs Act, "extortion means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951 (b)(2). "The victim's fear must be a

reasonable fear, under all the circumstances of each particular case," United States v. Furey, 491 F. Supp. 1048, 1061 (E.D. Pa. 1980), Aff'd, 636 F.2d 1211 (3d Cir. 1980), cert. denied, 452 U.S. 913 (1981) (emphasis added), and must be examined "from the perspective of the victim." United States v. Traitz, 871 F.2d 368, 391 (3d Cir. 1989), cert. denied. 493 U.S. 821 (1989). The testimony regarding the victim's background was relevant to whether or not a reasonable person in his position would have feared Boggi. Cf. Restatement (Second) of Torts § 11 cmt. a ("The circumstances which the actor should know are those which a reasonable [person] would know if [such person] were in the actor's position"). It was not error to overrule the objections.

As in the motion for acquittal, Boggi argues that there was a variance in dates in the Superseding Indictment and those proved at trial. This argument was rejected in denying the motion for acquittal.

Boggi argues that the court erred in

refusing to admit audio tapes to show that he refused to accept cash payments from Michael Marrone and told Marrone that all checks for union health and welfare benefits should be paid directly to the union fund. Boggi believed that his failure to accept cash payments from Marrone was relevant to prove he did not accept other payments charged in the indictment.

Although a criminal defendant may present evidence of a pertinent character trait, F.R.E. 404(a)(1), such proof "may be made by testimony as to reputation or by testimony in the form of opinion." F.R.E. 405(a). A criminal defendant may use proof of specific instances of conduct only where character or trait of character is an essential element of a charge, claim, or defense. F.R.E. 405(b). Defendant's character was not an essential element of any of the charges, so defendant could not use specific instances of conduct to prove character. Government of the Virgin Islands v. Grant, 775 F.2d 508, 511-12 (3d Cir. 1985)(Rule 405(a) does not make an

exception for accused persons seeking to prove their good character by specific acts); see also United States v. Cameio, 929 F2.d 610, 612-13 (11th Cir. 1991)(evidence of prior good conduct not admissible to negate criminal intent), cert. denied sub nom. Setien v. United States, 112 S. Ct. 228 (1991); United States v. Beverly, 913 F.2d 337, 353 n.23 (7th Cir. 1990)(character evidence may not be proved by instances of specific conduct unless character of a person is an essential element of a charge, claim, or defense), cert. denied 498 U.S. 1052 (1991); United States v. McGuiness, 764 F. Supp. 888, 896 (S.D.N.Y. 1991); (refusal of bribes on specific occasions is not admissible to prove character of accused).

Although defendant has not specifically argued that the tapes were admissible as "background evidence," refusal to admit them on that basis was not error. The court has wide discretion in determining whether to admit background evidence. Grant, 775 F.2d at 513. Evidence that a defendant refused cash

payments on one or more occasions is not relevant to whether he accepted payment or things of value on the occasion charged in the indictment. See United States v. De Peri, 778 F.2d 963, 983-84 (3d Cir. 1985) ("Evidence that not all vendors were extorted is irrelevant to the charge that defendants conspired to extort and did extort protection payments from certain vendors."), cert. denied sub nom. Pecic v. United States, 475 U.S. 1110 (1986). Denying the admissibility of the tapes was not an abuse of discretion.

Boggi argues that the Court erred in denying defendant's motion to require the government to provide the address and whereabouts of Marrone; defendant claims that Marrone has unspecified evidence clearly exculpatory and beneficial to the defendant, and the defendant was prejudiced by the government's refusal to provide this information. There was no evidence relating to Marrone aside from the tapes discussed above, and those tapes did not constitute exculpatory or material evidence. See id. It

was not prejudicial error to deny Boggi's request.

Boggi claims that it was error not to allow him to call certain character witnesses. The court allowed Boggi to call numerous character witnesses and only precluded additional character evidence that would have been cumulative. This was not error. See United States v. Sullivan, 803 F.2d 87, 89-90 (3d Cir. 1986), cert. denied, 479 U.S. 1036 (1987).

Boggi also [sic] that it was error to sustain objections to his questions regarding the character of government witnesses. Boggi was allowed to impeach the credibility of government witnesses and was only prevented from asking irrelevant questions about their political views.

Boggi argues that his cross examination of Carmen Calvanese was improperly limited. Boggi was given ample opportunity to impeach the credibility of Calvanese and was only prevented from inquiring into the terms of a plea agreement already in evidence.

Boggi raises the same statute of limitations argument in his motion for acquittal; it is without merit for the reasons stated in denying the Motion for Acquittal.

Boggi claims that the "pattern of racketeering," required by 18 U.S.C. § 1962(c), was never established. The pattern requirement is met if the government proves two or more related acts within ten years of each other that amounted to or posed a threat of continued criminal activity and that one of the acts occurred within the five year statute of limitations period. See id. at § 1961(5); H.J., Inc. v. Northwestern Bell, 492 U.S. 229, 239 (1989). The jury was required to find at least two predicate acts within ten years with one committed within five years of indictment. But it was also required to find relatedness in the sense of the same purpose, participants, victims or method. It was also required to find continued activity as part of a long-term association or regular way of doing business.

Samuel Kaufman testified that he made

payments to Boggi in 1984, 1985, 1986, 1987, 1988 and in May of 1989. See Trial Tr., July 28, 1994, at 256-63. The indictment was filed on March 30, 1994. The government also introduced evidence of payments to Boggi within the five-year statutory period from officials of Wyatt, Inc. and Leslie Homes, Inc. The multiple related predicate acts, continued over an extended period of time, established a pattern of racketeering activity. The evidence was sufficient for the jury to so find.

Boggi claims it was error to disallow four of his requested jury instructions. Three of his requested jury instructions, number 9, 13 and 26, were encompassed within the court's instructions. His request that the jury consider whether it is unusual or evidence of a crime to receive tickets to an athletic event from a friend, neighbor or acquaintance, number 25, has no basis in the law.

Boggi also objects to several of the court's jury charges. At the end of trial,

Boggi objected only to the charge regarding conspiracy and the court cured that charge. See Trial Tr., August 2, 1994, at 50-54. Boggi now objects to the charge on character evidence. He argues that the court should have instructed the jury that evidence of a defendant's good character, standing alone, is sufficient for an acquittal (government request 13), instead of stating that such evidence alone is sufficient to create a reasonable doubt. The court instructed the jury that it could consider evidence of the defendant's good character along with all the other evidence in determining whether the government had proved beyond a reasonable doubt that defendant had committed the acts alleged in the Superseding Indictment. The instruction was not in error. See United States v. Spangler, 838 F.2d 85 (3d Cir. 1988). Any error was harmless as Boggi's requested charge would not have affected the jury's verdict. Boggi's objections to other jury charges (government requests 12, 22, 27 and 29) are based on incorrect statements of

the law or were adequately addressed by instructions given. The charge, taken as a whole, fairly instructed the jury on all of the statutory violations charged.

Boggi argues that it was error for the court to reject his request for a form of verdict sheet requesting the jury to determine whether each racketeering act in Count I had been proved before reaching a general verdict on Count I. Boggi cites no authority for this argument. The court cannot recall a timely request to modify the verdict sheet, but the form of the verdict sheet enabled the jury to find Boggi guilty or not guilty on each act charged as a pattern of racketeering in Count I. The form of the verdict sheet was not in error. While another form of verdict sheet may have been preferable, any error was harmless as the jury was required to find each act of Count I proved or not proved.

Taking the evidence and rulings of the court in their entirety, the verdict does not convince the court that there has been a miscarriage of justice, regardless of the

court's personal view as to the weight of the evidence or the guilt or innocence of the accused of one or more of the acts charged.

The Motions for Acquittal and a New Trial will be denied.